

No. 3126

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IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

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JAMES A. MURRAY,

*Appellant,*

vs.

H. E. RAY, as Trustee of the Estate of Alec  
Murray, Bankrupt,

*Appellee.*

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**Upon Appeal From the United States District Court  
for the District of Idaho, Eastern Division.**

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**ANSWER TO PETITION FOR REHEARING.**

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J. M. STEVENS,

*Solicitor for Appellee.*

FILED

AUG 26 1910



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*To the Honorable William B. Gilbert, Presiding Judge,  
and the Associate Judges of the United States Circuit  
Court of Appeals for the Ninth District:*

Comes now the appellee in the above entitled cause, H. E. Ray, Trustee of the Estate of Alec Murray, Bankrupt, by and through his attorney, J. M. Stevens, Esq., and answering appellant's petition for re-hearing, resists the same upon the grounds and for the reasons hereinafter set forth:

The appellant sets forth in order, that the Court erred in holding that the conveyance, the subject matter of this action, was made without consideration and as a gift and under this head cites various cases giving legal defini-

tions of “understanding”; that the Court erred in considering as evidentiary matter the opinion in the case of the City of Pocatello vs. Murray, 23 Idaho 444. We submit that both of the alleged errors were duly considered in the briefs by the respective parties heretofore submitted to the above entitled Court and in the oral argument and in the opinion of the above entitled Court written by Mr. Justice Gilbert.

After a careful reading of appellant’s petition for rehearing, we are of the opinion that there is nothing therein contained not heretofore considered and passed upon by the above entitled Court. Appellant lays great stress upon the word “understanding”, in answer to which we respectfully submit that the trial Court, in its opinion, passed upon the evidence as a question of fact, while appellant here argues the proposition as a question of law, and the above entitled Court in its opinion has sustained the trial Court in its findings of fact, and affirmed its decision. Manifestly therefore, the evidence, among which appears the testimony using the word “understanding”, was passed upon, and as this was a question of fact regarding appellant’s contention as to an oral trust, there is nothing new presented to the above entitled Court by the appellant.

Appellant in his second assignment of error devotes considerable space to the discussion of the case of the City of Pocatello vs. Murray, 23 Idaho 444, and insists that it was error for the trial Court to consider this case. In connection therewith, we would like to call the Court’s attention to appellant’s assignment of errors (Trans.

Pages 77, 78, 79, and 80) and submit that this evidence is not assigned therein as error. Furthermore the appellant has not heretofore, during the entire course of this case, even intimated that it was error for the Court to consider the case of the City of Pocatello vs. Murray, 23 Idaho 444, and made no objections to its admission at the time of the trial, either when it was introduced or subsequently (Trans. P. 65), and, in our opinion it is a rather late hour to complain for the first time of this evidence.

The appellant described the above cited case in his Additional and Supplemental Brief on Behalf of Appellant, at pages 12, 13, 14 and 19; but his argument then was to the effect that said case made no difference in this matter but "is something with which the State of Idaho is concerned", while in his present petition for a rehearing, he is much concerned over the manner of its introduction and not as to its probative value.

In other words, it appears to us that the appellant has abandoned his original position and is simply casting about for some plausible excuse and that at a time long after the proper place or forum in which to make such an objection and we further confidently assert that this matter, having been treated heretofore, both in the briefs and oral argument of appellant and appellee, is not a proper subject for petition for rehearing in this matter, and has been heretofore passed upon by the above entitled Court in its opinion affirming and quoting extensively from the memorandum decision of the trial Court.

We regard it as useless to further present to the Court argument in this matter for the reason that we earnestly

believe appellant in his present petition has offered nothing new to the Court and that a rehashing of the evidence and authorities heretofore cited would be uncalled for. Resting upon the firm conviction that the Court has rightly decided the above entitled case, we respectfully submit that the appellant's petition should be denied.

Dated, Pocatello, Idaho,

August 20th, 1918.

J. M. STEVENS,  
*Solicitor for Appellee.*